



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED AS TO ENTITLEMENT: January 26, 2012

CBCA 2404

SHARP ELECTRONICS CORPORATION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Andrew K. Wible, Andrew J. Mohr, and C. Kelly Kroll of Cohen Mohr LLP, Washington, DC, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **BORWICK**, and **VERGILIO**.

VERGILIO, Board Judge.

On April 26, 2011, the Board received a notice of appeal from Sharp Electronics Corporation (contractor) concerning its Federal Supply Schedule agreement, GS-25F-0037M, with the General Services Administration (GSA or agency). The Department of the Navy entered into a contract under the agreement by placing a delivery order (N00700-03-F-0188) for various items on a lease to ownership plan (LTOP) basis, with pricing calculated based upon a forty-eight month lease. The initial order covered one fiscal year; the contract specifies payments the Navy must make should it not continue the lease for the full term. The Navy ended the lease after the first fiscal year, but did not make payments pursuant to the agreement; rather, it unilaterally deemed the contract illusory and illegal, denying reimbursement of any cancellation charges. By agreement of the parties, the record is complete on the question of entitlement; quantum awaits a completed record for resolution.

Initially, a Navy contracting officer denied the contractor's claim to be paid \$102,254.45 in accordance with the terms of the contract. Thereafter, the contractor submitted to a GSA contracting officer a claim regarding the interpretation of the contract and payment required thereunder. The GSA contracting officer denied the claim. The Board concludes that it has jurisdiction over this dispute and that the contract is neither illusory nor illegal. The Navy mischaracterizes the lease as a forbidden multi-year agreement. The agreement is effective for one fiscal year with pricing specified both for renewal and non-renewal. Although the Navy may have set aside inadequate funds at the time of contracting, the record does not show a lack of appropriations. The seeming errors of the Navy do not permit it to unilaterally rewrite the contract by fabricating a price contrary to the express intent of the parties at the time of award. The contract dictates the cancellation charges should the Navy not renew the contract. The contractor is entitled to recover pursuant to those provisions. Accordingly, the Board grants the appeal as to entitlement.

Findings of Fact

1. With an effective date of September 18, 2001, the contractor was placed on GSA's multiple award Federal Supply Schedule for commercial items (contract GS-25-F-0037M), offering various plans for an agency to obtain copier/printers, supplies, and maintenance services. Exhibit 1 at 1.5, 2 (all exhibits are in the appeal file).

2. With an effective date of October 1, 2001, the agreement was modified to include LTOP provisions. Exhibits 4, 6. These provisions specify that the "Government must lease the copier equipment placed under the LTOP Plans, uninterrupted for the full term. Early termination will incur cancellation charges, see Paragraph 10." Exhibit 6 at 3 (¶ 3). Paragraph seven addresses renewal under funding constraints:

The Government cannot obligate funds beyond September 30th of each year. The initial term shall be from date of award and continue until expiration of the fiscal year.

Except as specifically provided herein, the Government shall renew each Purchase Order at the conclusion of the initial term, and at the end of any renewal term thereof, for a period of one year or until the end of the LTOP Term, whichever is sooner, for all the LTOP Equipment, by giving written notice of renewal to the Contractor as soon as practicable, but not more than thirty (30) days after the date the Government receives formal notification from its funding source of its approved budget.

Exhibit 6 at 4. Further, payment is to be made in full within thirty days after the date of an invoice. Exhibit 6 at 3 (¶ 6).

3. Paragraph ten (Cancellation Terms) of the LTOP provisions states in pertinent part:

For equipment Ordered and Installed under the subject GSA Contract: Notification of cancellation must be received, in writing, by Contractor's Operations Manager thirty (30) calendar days prior to the designated removal date.

The Government (or its authorized agents) may not terminate an LTOP under this contract in order to avoid its buyout obligations or to obtain the same or similar equipment at more favorable terms. Should early termination be required, the cancellation charge shall be equal to the net present value of the monthly payments remaining through the completion of the relevant LTOP term, discounted to present value at the same interest rate charged upon execution of the original LTOP order. All cancellation charges must be paid to Contractor at the remittance address specified on Contractor's invoices.

Termination for Convenience of the Government: Equipment ordered under the LTOP plan is intended to provide for a firm commitment by the Government to continue the plan and remit all monthly payments through completion of the committed term. It is understood that for various reasons, the Government may exercise cancellation of the LTOP prior to completion of the committed term under the Termination for Convenience clause of the Contract. Should the Government exercise early cancellation of an LTOP under this clause, the cancellation charge shall be calculated as described above.

Exhibit 6 at 5 (¶ 10). The clause also specifies that there will be no cancellation charge if cancellation is due to non-appropriation of funds, with the proviso that the Government will not replace the canceled model for the same organizational entity in the succeeding fiscal year. Exhibit 6 at 4 (¶ 10).

4. The agreement includes the Contract Terms and Conditions--Commercial Items (May 1999) clause, 48 CFR 52.212-4 (2000), which includes the following:

Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach

agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

Exhibit 1 at 79 (¶ d), 80 (¶ l).

5. On September 30, 2002, the Navy placed a delivery order, thereby creating a contract under the GSA agreement. The Navy obtained items (copiers) under the LTOP provisions priced for forty-eight months. The order indicates the initial funding and pricing for twelve months, October 1, 2002, through September 30, 2003 (fiscal year 2003). The contract incorporates the provisions of the contractor's agreement with GSA, including those quoted above. Exhibit 8 at 1-13.

6. The Navy utilized annually appropriated funds for the contract. Exhibit 8 at 14. The Navy allocated annual funds to cover only its obligations if it renewed the lease; it did not allocate funds to cover potential cancellation charges under paragraph ten (Finding 3). The record does not demonstrate that the Navy lacked appropriated funds to cover its obligations under the contract; rather, the Navy opted not to allocate sufficient funds to satisfy its contractual obligations.

7. After having provided timely notice to the contractor, the Navy did not renew the lease; the lease ended without renewal after twelve months of the forty-eight month pricing period. The lack of renewal was not due to the non-appropriation of funds. The Navy replaced the contractor's copiers with those of another contractor. Exhibit 11 (contractor's claim, exhibits 8, 9); Complaint (¶ 18); Answer (¶ 18).

8. The contractor submitted a certified claim dated September 30, 2003, to a Navy contracting officer, seeking to recover \$102,254.45 (said to reflect the cancellation charges pursuant to the contract) plus interest. By letter dated November 17, 2003, the Navy contracting officer denied the claim, concluding that the contractor's interpretation of the contract rendered it illegal and that reformation was not an available option. Exhibits 9, 11 (contractor's claim, exhibit 7 at 5 (¶ 9)).

9. The contractor's appeal to the Armed Services Board of Contract Appeals (ASBCA) resulted in a dismissal without prejudice to the proper disposition of the claim required by regulation. The board concluded that the Federal Acquisition Regulation (FAR) Disputes provisions in effect at the time of award and at the time the contracting officer

denied the claim, 48 CFR 8.405-7 (2002, 2004), required the Navy contracting officer to refer the unresolved dispute to a scheduling (i.e., GSA) contracting officer for disposition. *Sharp Electronics Corp.*, ASBCA 54475, 04-2 BCA ¶ 32,704.

10. Seeking to recover \$102,254.45 as the amount due under paragraph ten for non-renewal, plus interest under the Prompt Payment Act, 31 U.S.C. § 3902 (2006), and the Contract Disputes Act, now at 41 U.S.C.A. § 7109 (West 2011), the contractor submitted a claim dated October 3, 2006, to a GSA contracting officer. Following an agreed upon extension of time, a GSA contracting officer denied the claim by decision dated January 28, 2011. Exhibit 13.

11. The contractor filed its notice of appeal with this Board on April 26, 2011. Exhibit 14.

Discussion

Jurisdiction

As the ASBCA concluded, under regulation the Navy contracting officer had limited authority. When a dispute remained after the Navy contracting officer denied the claim, proper authority to resolve the dispute rested with the GSA contracting officer. The contractor timely submitted the claim to the GSA contracting officer, and timely appealed to this Board when that claim was denied.

Statute gives the ASBCA jurisdiction to decide any appeal from a decision of a contracting officer of the Department of Defense (including the Navy) relative to a contract made by that department or agency and gives this Board jurisdiction to decide any appeal from a decision of a contracting officer of GSA (among various agencies) relative to a contract made by that agency. 41 U.S.C.A. § 7105. Regulations place the contracting-level authority to resolve this dispute with the GSA contracting officer, thereby assuring that the Federal Supply Schedule agreement is consistently interpreted. As such, this Board views the agreement as a GSA contract for purposes of dispute resolution. The Board has jurisdiction over the dispute.

Merits

The contractor and Navy entered into a contract for one fiscal year. Pricing was contingent upon renewal, but the contract expressly provides for payments should renewal not occur. For the second fiscal year, the Navy did not renew the contract; however, the Navy's need for similar equipment continued while appropriations were available for

renewal. Therefore, the Navy became obligated to pay cancellation charges pursuant to the provision in paragraph ten of the contract, Finding 3.

The reliance by the Government on *Leiter v. United States*, 271 U.S. 204 (1926), is misplaced. In addressing the binding nature of a lease beyond the initial year, the Court notes the requirement for both appropriations and an affirmative act by the Government to continue a lease. This contract covers a single fiscal year, and notes the requirements for appropriations and an affirmative act by the Navy; it complies with the dictates of the Court. The contract does not obligate the Navy to renew the lease; rather, it imposes cancellation charges upon the Navy for failure to renew in various circumstances. In this case, the contractor seeks payment under the contract for the initial fiscal year. Annual appropriations were available to fund the contract, even if the Navy failed to allocate sufficient funds to cover its obligations. *Leiter* does not invalidate the Navy's obligations. Rather, it suggests that the Navy must fulfill its contractual obligations: "A lease to the Government for a term of years when entered into under an appropriation available for but one fiscal year, is binding on the Government only for that year." 271 U.S. at 207. Because appropriated funds were available, Finding 6, the contract does not violate provisions of the Anti-Deficiency Act. 31 U.S.C. § 1341 (2006). The Navy is bound to compensate the contractor pursuant to the terms of the contract.

The contract contains an explicit allocation of risks for the precise situation that arose. The contractor is entitled to recover cancellation charges under the plain language of the contract.

Decision

Accordingly, the Board **GRANTS** the appeal on the question of entitlement; quantum awaits a completed record.

JOSEPH A. VERGILIO
Board Judge

We concur:

JERI K. SOMERS
Board Judge

ANTHONY S. BORWICK
Board Judge